IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.W.P. No. 16016 of 2000

DATE OF DECISION: 3.12.2007

Jai Parkash and others

…Petitioners

Versus

State of Haryana and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

Present: Mr. Rajiv Atma Ram, Senior Advocate, with
Mr. Abhishek Shukla, Advocate,
Mr. Ram Kumar Malik, Advocate,
for the petitioners.

Mr. Sanjiv Bansal, Additional AG, Haryana,
for the respondents.

JUDGMENT

M.M. KUMAR, J.

This judgment shall dispose of C.W.P. Nos. 16016 and 16188 of 2000, 150, 1765 and 6341 of 2001, 6985 of 2004 and 8057 of 2005. However, the facts are being taken from C.W.P. No. 16016 of 2000. The petitioners have approached this Court seeking a writ in the nature of mandamus directing the respondent State to appoint them against the posts of Assistant Engineer (Civil) in the respondent Department in pursuance to their selection and recommendation made by the Haryana Public Service Commission.

The Haryana Public Service Commission (for brevity, 'the Commission') issued an advertisement in English Daily 'The Tribune, 'Indian Express, Chandigarh' on 17.7.1996, 'Times of India' on 19.7.1996,and Hindi Daily 'Dainik Tribune, Chandigarh' on 18.7.1996 for filling up 6 temporary posts of Assistant Engineer (Civil) Class-II in the P.W.D. (B&R Branch) Haryana, in the pay scale of Rs. 2200-4000 plus usual allowances as sanctioned by the Haryana Government. One post each was kept reserved for Scheduled Castes of Haryana (Block A) and Backward Class of Haryana. The age prescribed was not below 20 years and not more than 35 years as on 1.8.1996. Relaxation in upper age limit was admissible to various reserved categories as per Government instructions. The candidates were required to possess (i) Degree in Civil Engineering of a recognized University or one of the other equivalent qualifications in Civil Engineering as specified in Appendix 'B' to the HSE Class-II, PWD (B&R) Branch Rules, 1965 (Annexure P-1). Thereafter the Commission issued a corrigendum in

September, 1999 for increasing the total number of posts for Assistant Engineer (Civil) P.W.D. (Buildings and Roads Branch) from 6 to 39 with the following breakup:-

General	24
S.C. of Haryana (Block A)	4
S.C. of Haryana (Block B)	4
B.C. of Haryana	4
ESM of Haryana	2
Physically handicapped of Haryana with 40% disability	1

The last date of submission of applications was extended upto 30.11.1999 and the date for the purposes of age was fixed as 1.8.1999 instead of 1.8.1996.

The petitioners being eligible submitted their applications. It is admitted position that they were called for screening test and after successfully clearing the same, interviewed by the Commission on different dates in March, 2000. The final result of the selection was published on 31.5.2000 (P-4). On 31.5.2000, the Secretary of the Commission sent a letter to the Financial Commissioner and Secretary to Government Haryana, P.W.D. (B&R) Department recommending the names of the candidates including the petitioners categorywise in order of merit for appointment to the post of Assistant Engineer (Civil) Class-II in P.W.D. (B&R) Department, Haryana (P-4/A). On 8.8.2000, letters were issued by the respondent Department to the Director, Health Services Haryana, Chandigarh,

with a copy to the concerned selected candidates asking them to appear before the Director, Health Services for their medical examination (P-5). Similarly, letters were also issued to the concerned District Magistrates for verification of character and antecedents of the selected candidates for the post of Assistant Engineer for illustration, one such letter dated 10.8.2000 has been placed on record (Annexure P-6).

It is pertinent to mention that respondent No. 1 issued an order dated 21.8.2000, mentioning therein that in pursuance of sub-rule 3 of Rule 5 of the Punjab Service of Engineers Class-II PWD (Buildings and Roads) Rules, 1965, the Governor of Haryana was pleased to promote 42 Junior Engineers (Diploma Holders) and 1 B.E./AMIE qualified member of Draftsman/Tracer Service as Sub Divisional Engineers on ad hoc basis as a stop gap arrangement for a period of six months in the scale of Rs. 8000-135000, in public interest subject to the approval of the Commission and with the condition that they were to be reverted to their original post as and when direct recruits join (P-7). Thereafter, the petitioners made representations Annexures P-8 (Colly) and even claims to have personally met with various concerned authorities but of no avail and ultimately instant petition has been filed on 22.11.2000.

On 17.1.2001, a short written statement was filed by the Under Secretary to Government Haryana, Public Works (B&R) Department, Chandigarh, on behalf of respondent No. 1 taking the stand that no legal or fundamental rights of the petitioners have been

infringed nor any substantial question of law has been raised by the petitioners. It was further pleaded that mere selection did not confer an indefeasible right to seek appointment. The factual matrix of case such as issuance of advertisement, corrigendum, increase of posts and recommendation of selected candidates by the Commission and filling up the posts from Junior Engineers and other categories as a stop gap arrangement was admitted in the aforementioned short written statement. It is pertinent to notice the stand taken therein concerning austerity measures in paras 5 and 6 of the short written statement, which is reproduced as under:-

> " 5. In the mean time the State Govt. constituted a committee of Secretaries on 21.9.2000 for reviewing the work load norms of one Division of Engineering Department considering the inflationary trends which have been continuing during the last few years. The work load norms of this department were revised by the Haryana Govt. in the year 1984. It was further decided by the Govt. that pending this exercise no recruitment of Engineers at any level in any department should be undertaken. This order of the Govt. superceded all earlier orders of the Govt. whereby such recruitments had been permitted. This exercise regarding down sizing had been initiated by the Govt. in all the departments keeping in view the heavy expenditure of establishment in various departments. The review of deployment of excessive

manpower had been necessitated due to technological breakthroughs and innovations made in the Electronic Sector and introduction of Computers and other such equipment in to Govt. Sector. In fact in some Govt. controlled Boards/Corporations etc., this exercise has already been completed. A committee of Secretaries was constituted for revision of workload norms of one Division of Engineering Department which has held 3 meetings under the Chairmanship of Financial Commissioner & Secretary to Govt., Haryana, Finance Department. The proceedings of these meetings are annexed herewith at R-I, R-II and R-III. First report of the Committee is enclosed at Annexure R-6.

In view of the above developments the Govt. has reverted the Sub Divisional Engineers promoted vide Endst No. 4/50-B&R(E)-5/99 dated 21.8.2000 to the posts of Junior Engineers (diploma – holders) – AMIE/qualified – Junior Engineers, qualified Head Draftsman, B.E./AMIE qualified member of Draftsman/Tracers services vide order No. 4/50-B&R (E)-5/99 dated 16.1.2001 which is annexed at R-4.

6. In the meantime Govt. has revalidated the selection list of candidates recommended by Haryana Public Service Commission for appointment as Sub Divisional Engineers on 21.5.2000 for a further period of

six months beyond 30.11.2000 for the purpose of appointment of selected candidates of the commission to the extent of advertised posts, if the need arises. A copy of this advice of Chief Secretary is annexed at R-5. Thus no prejudice is being caused to the petitioners."

A perusal of paras 5 and 6 would reveal that the stand of respondent No. 1 is that since a Committee of Secretaries was reviewing the work load norms of the department for down sizing of the establishment in the department keeping in view the inflationary trends, heavy expenditure of establishment, innovations made in the electronic sector and introduction of computers & other such equipment in to Government Sector etc., therefore, the petitioners were not appointed as the number of posts was likely to decrease. In order to substantiate this, proceedings of three meetings and first report of the Committee has been placed on record as Annexures R-I, R-II, R-III and R-VI respectively. The select list of candidates recommended by the Commission for their appointment as Sub Divisional Engineers on 21.5.2000 was revalidated for a further period of six months beyond 30.11.2000.

At this juncture it would be relevant to refer to various interlocutory orders passed by this Court and the stand taken by the respondents from time to time.

In this case notice of motion was issued on 23.11.2000. On 5.2.2001, learned State counsel made a statement that the State Government was considering the claim of the petitioners as the

Committee had submitted its report which was under consideration. The respondent State had sought time to place before the Court the final position emerging out of adoption of austerity measures. On 21.3.2001, on the statement made by learned Advocate General, Haryana, a Division Bench of this Court passed the following order:-

> " The learned Advocate General, Haryana has made a statement that State Council of Ministers has taken a policy decision for re-structuring of the Engineering Department which is likely to do away with certain un-necessary posts in the department. As a follow up action, some time is required to know if the petitioners have a chance for issuance of appointment letters. The learned Advocate General seeks time for making up the final shape of the decision of the Committee.
>
> As requested, two months time is given for final report of the Committee in respect of the re-structuring of the cadre strength of the P.W.D. department.
>
> Adjourned to 28.5.2001."

On 28.5.2001, further time was sought by the learned State counsel to place on record the final order supported by an affidavit. Thereafter the case was adjourned for 31.5.2001, 9.7.2001, 25.7.2001 and on 25.7.2001 the same was admitted.

During the pendency of the writ petition, respondent No. 1 has sent a requisition to the Commission, vide letter dated 3.3.2006,

for filling up 44 posts of Assistant Engineer (Civil) in Haryana PWD (B&R) Department. The petitioners then filed Civil Misc. Application No. 7543 of 2006 for staying the aforementioned requisition. On 30.5.2006, while dealing with C.M. No. 7543 of 2006, this Court passed the following order:-

> " Reply to application on behalf of respondents filed in the court today, is taken on record.
>
> This is a Civil Misc. application for staying the requisition (Annexure A) whereby the Financial Commissioner and Principal Secretary, Government of Haryana Public Works (B&R) Department on 3.3.2006 made a requisition of 44 posts of Assistant Engineer (Civil) in Haryana P.W.D. (B&R) Department.
>
> Learned counsel for the petitioners contends that the posts of Assistant Engineers had earlier been duly notified by the Haryana Public Service Commission and the petitioners were recommended for appointment as Assistant Engineers. However, when the petitioners were not being appointed, the present petition was filed seeking issuance of a writ in the nature of mandamus to appoint the petitioners as Assistant Engineers. Now during the pendency of the writ petition, the requisition dated 3.3.2006 (Annexure A) has been sent and in case the said posts are filled up, the petitioners would suffer irreparable loss.

In response learned counsel for the respondents has submitted that the posts which have been requisitioned in terms of Annexure A dated 3.3.2006 have nothing to do with respect to the posts against which petitioners have raised a claim, as these posts have arisen after the expiry of the validity period of the earlier select list. He has further referred to the order dated 4.2.2005 passed by this court in C.M. No. 2119 of 2005 filed in the present petition wherein this court observed that no ground to stay the order dated 17.1.2005 or grant the prayer for restraining the lapsing of the select list dated 31.5.2000 was made out. It was further observed that the same would be subject to the result of the writ petition.

I have given my thoughtful consideration to the matter. The prayer of the petitioner for restraining the respondents from lapsing of the select list dated 31.5.2000 has already been declined by this court vide order dated 4.2.2005.

In the circumstances, no ground is made out for restraining the respondents from filling the posts which have been requisitioned in pursuance of Annexure 'A' dated 3.3.2006.

Prayer for grant of stay is, therefore, declined. However, the appointments, if any, made

pursuant to the requisition (Annexure 'A') shall be made subject to the decision of the writ petition.

Learned counsel for the petitioner has, however, submitted that in the circumstances, an early actual date of hearing of the writ petition may be fixed in terms of the second alternative prayer made in the Civil Misc. application.

After giving my thoughtful consideration, I find the said prayer to be reasonable.

Accordingly, the writ petition be listed for hearing in August, 2006.

C.M. stands disposed of."

When the matter came up for consideration on 13.12.2006, this Court passed a detailed order, which reads as under:

" During the course of arguments it emerged that the facts have been disputed with regard to number of vacancies available on 31.5.2001 for the direct recruits Sub Divisional Engineer (Civil) and thereafter. The respondent State has taken the plea of restructuring for refusing to appoint the petitioners who were selected against 39 vacancies advertised. How the restructuring has reduced the number of vacancies/posts concerning direct quota has not become clear because the respondent State has relied upon the decision of the Council of Ministers, dated 15.3.2001, wherein the proposal made

by the Financial Commissioner and Secretary to Government, Public Works Department (B&R) Department was approved by the Council of Ministers in its meeting and the same reads as under:-

"2. The Council of Ministers in its meeting held on 15.03.2001 has taken the following decision in this matter:-

"The proposal was approved subject to the following modifications:-

i) Divisions would not be constituted on the basis of financial norms of work to be handled.

ii) Same divisions would look after the work of both roads and buildings.

iii) Reduction in number of posts of different categories would be as per the recommendations of the Committee headed by the Finance Secretary in its meeting held on 17.1.2001. The Department would work out proposals for their deployment subject to this ceiling.

iv) A Common policy would be formulated for the staff rendered surplus as a result of restructuring

exercise carried out in various Government departments."

3. The Administrative Department is requested to kindly implement the decision of the Council of Ministers at the earliest and to send a copy of the orders issued in this regard, if any, to the Cabinet Section, within a fortnight, positively."

Mr. Rajive Atma Ram and Mr. R.K. Malik, learned counsel for the petitioners have submitted that restructuring as per the decision of the Council of Ministers at para 2(iv) has not been implemented in any other department except the Public Works Department (B&R) only qua the posts of Assistant Engineer (Civil). The decision has not been implemented with regard to reversion of Class-I officers to the post of Assistant Engineer nor it has been effected in any other department, is the argument raised by the learned counsel for the petitioners. It has further been suggested that even after the restructuring the vacancy position in accordance with the rules of quota between the promotee and direct recruits has not been correctly depicted and some of the vacant posts belonging to direct quota have been permitted to be occupied by giving additional charge of the post of Assistant Engineer to the Junior Engineers on ad hoc basis or to existing Assistant

Engineers who belong to the promotee quota in the Service as additional charge. However, the facts are being disputed by the learned State counsel.

In order to resolve the controversy on facts, it has become necessary to seek specific affidavit of an officer not below the rank of Financial Commissioner and Secretary to Government Haryana, PWD (B&R) Department, on the following issues:-

(i) Whether the restructuring has been effected only with regard to the post of Assistant Engineer in the PWD (B&R) Department and as to whether it has been applied to Class-III and Class-I posts as well? If the restructuring/down sizing has been confined only to Class-I Assistant Engineers then the reasons for such partial implementation?

(ii) Whether the restructuring has been carried out in any other department?

(iii) How many posts have been reduced as a result of restructuring/down sizing as per the decision of the Council of Ministers, dated 15.3.2001 and what is the effect on the direct quota vacancies/posts?

(iv) How Junior Engineers/Assistant Engineers were permitted to continue on ad hoc basis

by giving them additional charge of the post of Assistant Engineer from 31.5.2001 onwards?

(v) It must also be specified how many persons have been promoted so as to clearly bring out the ratio of 57:43 as per the rule of quota for direct recruit and promotee respectively and the amended quota rule w.e.f. 29.1.2004.

(vi) If there are any posts created by the Government in the cadre of Assistant Engineer before or after restructuring, the same should also be specified in the affidavit.

(vii) It may also be specified in the affidavit as to how many posts of Assistant Engineer Civil, Mechanical, Horticulture and Electrical are there. This information is required to be given in addition to the information earlier pointed out, which allegedly postulate only one cadre of Assistant Engineer.

Let the needful be done within three weeks with a copy in advance to the learned counsel for the petitioners in the instant case as well as to the learned

counsel for the petitioners appearing in the connected petitions.

Part heard for 10.1.2007.

Undertaking given by the learned State counsel on 29.11.2006 shall continue."

In pursuance to the order dated 13.12.2006, an affidavit of Shri Dharamvir, IAS, Financial Commissioner and Principal Secretary to Government Haryana, PWD (B&R) Department, Chandigarh, dated 9.1.2007, giving parawise information on the queries made by this Court was filed. A counter affidavit dated 8.2.2007 was also filed on behalf of the petitioners

In compliance with the order dated 13.12.2006 passed by this Court, Sh. Dharamvir, IAS, Financial Commissioner & Principal Secretary, Government of Haryana, PWD (B&R)Department, Chandigarh filed an affidavit dated 9.1.2007 asserting that the restructuring of the staff has been effective in all categories of posts of the Department from class I to IV thereby reducing the sanctioned posts for each cadre or category as per the chart. It has further been submitted that restructuring has not been confined only to PWD (B&R) Department and the same has been carried out in other departments as well. In that regard reliance has been placed on an intimation sent by Worthy Chief Secretary, Haryana dated 4.1.2007 (Annexure A-1). The aforementioned intimation shows that restructuring has been carried out in 55 departments, which includes Public Relations, Environment, Fisheries, I.T.Is, Supplied and

Disposals, Printing and Stationary, Development and Panchayats, Secondary Education, Rural Development, Excise and Taxation, Town and Country Planning etc. The details of restructuring have been furnished in a tabulated form in respect of PWD (B&R) Department, which reads as under:-

Sr. No.	Name of the post	No of sanctioned posts before restructuring	Strength approved after restructuring
1	Chief Engineer	**5**	**4**
2.	Superintending Engineer (Civil) Superintending Engineer (Elect.) Superintending Engineer (Mech.)	18 1 1	15 1 1
3.	Executive Engineer (Civil) Executive Engineer(Elct.) Executive Engineer (Mech.) Executive Engineer(Hort.)	76 8 8 2	58 5 5 1
4.	Assistant Engineer (Civil) Assistant Engineer(Elect.) Assistant Engineer(Mech.) Assistant Engineer(Hort.)	235 27 26 7	153 22 12 5
5.	Junior Engineer (Civil)	846	611
6.	Circle Head Draftsman (Civil)	22	18
7.	Head Draftsman (Civil)	77	60
8.	Assistant Draftsman (Civil)	203	106
9.	Tracers (Civil)	128	63
10.	Road Inspector	127	76
11.	Clerks (Head Office)	98	72
12.	Restorer (Head Office)	10	5
13.	Dy. Superintendent (Civil/ Elect./ Mech.)	71	55
14.	Head Draftsman (Elect./ Mech.)	12	9
15.	ADM (Elec./ Mech.)	29	15
16.	Tracers (Elec./ Mech.)	29	11
17.	Senior Accounts Clerk	192	162
18.	Steno-typist	58	55
19.	SDCs.	229	169
20.	Clerk	886	506
21.	J.E.(Elect.)	117	95
22.	J.E.(Mech.)	103	50
23.	J.E.(Hort.)	28	22

Sr. No.	Name of the post	No of sanctioned posts before restructuring	Strength approved after restructuring
24.	Peon	702	542
25.	Chowkidar	309	55
26.	Sweeper	260	To be outsourced
27.	Ferro Khallasi	76	67
28.	Divisional Accountant	56	53

The affidavit further asserts that after restructuring the posts, the number of posts of Sub Divisional Engineers/Assistant Engineers (Civil) have been reduced to 159 and according to Rule 6 of 1965 Rules, the direct recruits become entitled to 91 posts and the promotees acquire the right to appointment to 68 posts. It is claimed that against the quota of 91 Assistant Engineers by direct recruitment 109 direct recruits were already in position and there was no post available which could be filled up out of the recommendations made by the Haryana Public Service Commission in respect of the petitioners. It was on that account that the petitioners who although recommended by the Haryana Public Service Commission, were not offered appointment on 31.5.2001 i.e. the date of expiry of the select list.

The affidavit further explains that on the date of expiry of select list on 31.5.2001, as prepared by the Haryana Public Service Commissioner there were total 107 direct recruits and 126 promotees (Assistant engineers) in position against the cadre strength of 91 and 68 respectively. The excess number of Assistant Engineers (Civil) were continued to be adjusted against the resultant vacancy arising

after 31.5.2001 in their respective quota. On account of administrative exigencies, 48 Junior Engineers/Circle Head Draftsmen were given additional charge to look after the work of the post of Sub Division Engineers (Civil) in additional to their own duties without any extra remuneration vide Government order dated 7.12.2004. It is claimed that no promotion was made and it was only a stop gap arrangement. However, it is admitted that out of 48 Junior Engineers, the ad hoc promotions of 40 officials as Sub Division Engineers(Civil) have been made vide Government order dated 31.12.2005 against their quota posts as per the restructured cadre and that promotions of 20 official as Sub Divisional Engineers (Civil) has also been made vide Governments order dated 6.10.2006 and 28.12.2006 against their respective quota posts. It has further been submitted that from 15.3.2001 to 7.12.2004 neither any ad hoc promotion nor additional charge was given in the cadre of Assistant Engineers (Civil) and that the practice of assigning current duty charge has been stopped by the Government with effect from 9.6.2005. A list depicting the names of the Assistant Engineers (Civil) from both sources as on 31.5.2001 has been placed on record as Annexure A-II and A-III (107 direct recruits and 126 promotees). It has also been clarified that no post in the cadre of Assistant Engineers before or after restructuring has been created by the Government. The affidavit further claims that the Government is filling up the posts of Assistant Engineers separately from amongst the candidates having qualification of respective trades like Civil,

Mechanical, Horticulture and Electrical and that their seniority lists are also maintained separately. In other words, the Government claims that there was no common cadre of Assistant engineers in respect of Civil, Mechanical, Horticulture and Electrical although such an issue has been referred for adjudication to the Larger Bench of this Court in C.W.P. No. 3494 of 2003, titled as Vijender Kumar Gupta and others Vs. State of Haryana. According to the affidavit, the select list was received from the Haryana Public Service Commission on 31.5.2000 and the same was valid till 30.11.2000. The period of select list was extended for six months and finally the said select list elapsed on 31.5.2001.

The affidavit further clarifies that 44 vacancies of Assistant Engineers for which requisitions for filling up those vacancies by direct recruitment was sent to Haryana Staff Selection Commission are stated to have arisen after the date of elapse of the select list i.e. From 1.6.2001 to 3.3.2006. A detailed chart with the names of officers who have retired, has been filed with the affidavit as Annexure 'A-IV' claiming that although total 59 vacancies in the cadre of Assistant Engineers (Civil) were available as on 3.3.2006 but the department had sent requisition only for 44 posts. It is claimed that these vacancies, which have now been advertised, have got nothing to do with the vacancies for the period prior to 31.5.2001 on which the petitioners might have some claim.

The aforementioned affidavit is sought to be controverted by affidavit of one Sh. Mani Ram by filing C.M.No. 2112 of 2007 which is dated 8.2.2007. It is claimed that the

respondent-State was wrongly applying the quota to the posts available in the Department on the basis of the vacancies available and that there is inherent defect in the calculation of the quota. There are further averments with regard to the roster register which is said to have moved up to Sr. No. 73 under the 1965 Rules as amended in the 1989 when quota was revised to 57:43. After the roster point No. 73, the posts have only been filled up from promotees' quota on ad hoc basis and no direct recruitment has been made. A copy of the roster register in that regard has been placed on record as Annexure 'P/A'. There are allegations that additional charge of the post of Sub Divisional Engineers have been given to Sarvshri O.P. Arya, H. Khera, Raja Ram, Satya Narain, S.C. Mehta etc., who were holding substantive posts of Junior engineers (Annexure 'H'). It has also been claimed that the posts of Chief Engineers had been filled up even after restructuring nullifying the stand that no reversion or promotions were made by the Government which in fact the alteration of the restructured strength. In respect of circular dated 28.10.1993 whereby the life of select list is six months, it has been submitted that the aforementioned circular has been repealed by Section 3 of the Haryana Civil Services (Executive Branch) and Allied Services and others Services Common/combined Examination Act, 2002 (for brevity 2002 Act). The aforementioned Act has been enacted with effect from 29.8.1989. It is alleged that the issue as to how Junior Engineers/Assistant Engineers were permitted to continue on ad hoc basis by giving them additional charge of the post of Assistant

engineer from 31.5.2001 onwards have been conveniently brushed aside. It is claimed that 105 Junior Engineers were allowed to continue beyond 31.5.2001 on ad hoc basis which as per Rule 6(3) of 1965 Rules cannot exceed period of six months.

Mr. Rajiv Atma Ram, Mr. R.K.Malik and other learned counsel have referred to pleadings at a considerable length. They have particularly emphasized on the affidavit of Sh. Dalip Singh dated 31.5.2001 with regard to the steps taken by the respondents for restructuring the PWD (B&R)Department. According to the learned counsel, the affidavit shows that the total posts of Assistant Engineers were 295 which were reduced to 192. They have also invited the attention of the Court to the decision taken by the Council of Ministers in its meeting held on 15.3.2001 and argued that 22 posts of Assistant Engineers were required to be kept so as to absorb those who were to be reverted on account of reductions of posts in the higher ranks like Executive Engineers, Chief Engineers, Superintending Engineers etc. It is claimed that in the cadre of 250 posts as on 1.1.1998, 143 posts belongs to direct recruits and 107 were for promotees. According to the learned counsel, if the Assistant Engineers are to be in excess of the cadre strength then they may have to be declared surplus but they could not be reverted.

The first submission made by learned counsel is that if a writ petition has been filed before the expiry of select list then it cannot constitute valid basis for declining the relief to the petitioner. According to the learned counsel, the instant petitions were filed in

the year 2000 and the select list which was published on 31.5.2000 (P-4), although expired on 30.11.2000 but the life of the select list was extended for a further period of six months as restructuring of the department have applied for austerity measures was going on. The aforementioned period expired on 31.5.2001. In that regard reliance has been placed on the judgment of Hon'ble the Supreme Court in the case of **State of U.P. v. Ram Swarup Saroj, (2000) 3 SCC 699**. On the aforementioned issue an ancillary argument has also been advanced that the period of six months determining the life of the select list flows from instructions dated 28.10.1993 and those instructions were repealed by Section 3 of 2002 Act which has been promulgated with retrospective effect from 29.8.1989. According to the learned counsel, the vires of the 2002 Act were challenged and its retrospective effect from the year 1989 has been upheld by Hon'ble the Supreme Court in the Cases of **Virender Singh Hooda v. State of Haryana, (2004) 12 SCC 588**. Learned counsel have also submitted that neither any policy decision of the council of Ministers has been placed on record nor it can be presumed that restructuring has been carried in other departments. They have referred to C.M. Nos. 19072 of 2004 and 22212 of 2004 to show that the posts of Sub Division Officers in various other departments have been advertised to substantiate their claim that restructuring has been carried out only in PWD (B&R) Department. A reference has also been made to C.M. No. 2119 of 2005. In para 3 of the application, it has been claimed that after restructuring, 33 vacancies for direct recruits have become

available. But the respondents has refused to offer those vacancies to the petitioners on the ground that the select list has expired on 31.5.2001 and those vacancies had occurred after the date of expiry of the validity period of the select list namely, 31.5.2001. Like wise, reference has been made to the averments made in C.M. No. 7543 of 2006 with regard to the requisition sent in respect of 44 vacancies to the Haryana Staff Selection Commission vide letter dated 3.3.2006 (Annexure-A with the application)(the aforesaid application has been opposed by filing reply (at page 92-CMs.). A reference has thus been made to para 3 of the C.M. No. 9488 of 2006 to highlight that the posts were advertised on 7.5.2006 by the Haryana Staff Selection commission (A-2 and A-3). It has further been highlighted by referring to the averments made in C.M. No. 14464 of 2006 that how the Junior Engineers were given the charge of the post of Assistant Engineers accepting the promotee quota and by encroaching upon the quota of the direct recruits. A detailed reference was made to the List Annexure A-1 giving the names of all such persons. The averments were controverted by filing reply.

Another argument raised is that the roster register has run only up to Sr. No. 73. Further argument advanced by the learned counsel for the petitioners is that there is no separate cadre of Assistant Engineers Civil, Mechanical, Horticulture, Electrical etc. and, therefore, all the posts of Assistant Engineers have to be treated as one and there cannot be any bifurcation. In that regard reliance has been made to Appendix B to argue that rule contemplates only one cadre of Assistant Engineers. Learned counsel have also argued that

the strength of service is required to be worked out each year in the manner prescribed in Appendix 'A'. In that regard reliance has been placed on a judgment of Hon'ble the Supreme Court in the case of **Amarjit Singh v. State of Haryana, 1984 (3) SLR 414**. It has also been pointed out that the affidavit filed by Sh. Dalip Singh makes reference only to the posts in the department of PWD (B&R). Relying upon Rule 2 of the 1965 Rules to substantiate its arguments learned counsel has pointed out that the artificial distinction on the basis of separate cadre of Civil, Mechanical, Horticulture Electrical etc. is sought to be created in order to defeat the accrued right of the petitioners.

Mr. Sanjiv Bansal, learned State counsel has stated that the petitioner did not enjoy any vested right which can be enforceable by the process of mandamus because they have been merely selected. According to him mere selection does not confer any indefeasible right of appointment. In respect of his contention learned counsel has placed reliance on the seven judgments of Hon'ble the Supreme Court in the case of **Shankarsan Dash v. Union of India, (1991)3 SCC 47**, **U.P. Bhumi Sudhar Nigam Limited v. Shiv Narain Gupta, 1994 Supply. (2) SCC 541**, **K. Jayamohan v. State of Kerala, (1997) 5 SCC 170**, **Rani Laxmibai Kshetriya Gramin Bank v. Chand Behari Kapoor, (1998) 7 SCC 469**, **Vinodan T. v. University of Calicut, (2002) 4 SCC 726**, **Batiarani Gramiya Bank v. Pallab Kumar, (2004) 9 SCC 100**, **State of U.P. v. Rajkumar Sharma, (2006) 3 SCC 330**.

Mr. Bansal has also submitted that no appointment could have been offered after the expiry of the life of the select list. According to the learned counsel, the select list expired on November, 2000, which was revalidated for another six months till 31.5.2001. He has maintained that no vacancy after 31.5.2001 is sought to be filled by advertisement issued in respect of 44 vacancies on 7.5.2006 and 8.5.2006 (A-II & A-III) with C.M. No. 9488 of 2006. In support of his submission learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court in the cases of **State of U.P. v. Harish Chandra, (1996) 9 SCC 309**, **Roshni Devi v. State of Haryana, (1998) 8 SCC 59**, **M.P. Electricity Board through Chief Engineer, M.P.E.B. v. Virendra Kumar Sharma, (2002) 9 SCC, 650**, **Union of India v. B. Valluvan, JT 2006 (9) SC 385**.

Last submission of the learned State counsel is that the State is fully within its right to restructure the cadre and on the aforementioned restructuring having been made, is also competent to deny appointment to the selected candidates. In that regard he has placed reliance on a Division Bench judgment of this Court in the case of **Mohinder Singh v. State of Haryana, 2006 (6) SLR 336**. Learned counsel has maintained that in the absence of any allegation of mala fide such restructuring cannot be attacked and the petitioners did not acquire any indefeasible right to seek appointment to such posts. As no allegations of mala fide have been levelled, learned counsel maintains that the decision of the Council of Ministers dated 15.3.2001 cannot be faulted.

I have thoughtfully considered the submissions made by the learned counsel for the parties and have minutely perused the record. For the sake of convenience it would be appropriate to divide the discussion under the following heads:

I. Whether restructuring of cadre by the Government to downsize the cadre strength for austerity measures is permissible under the 1965 Rules and the General law?

II. Whether the petitioners have acquired any indefeasible or vested right to seek appointments to the posts of Assistant Engineer, which could be enforceable by issuance of a writ in the nature of mandamus?

III. Whether the select panel after 31.5.2001 would continue to be alive with the consequence that appointments to the posts of Assistant Engineer may be made from that select panel?

RE: QUESTION I:

The first question has to be answered by referring to the 1965 Rules. According to Rule 4 of the 1965 Rules, the service is to comprise of such number of posts of Assistant Engineer as may be specified by the Government from time to time. It would be efficacious to read the aforementioned Rule, which is as under:-

> " 4. Strength of Service.-(1) The Service shall comprise of such number of posts of Assistant Engineers as may be specified by Government from time to time.

(2) Without prejudice to the generality of the provisions of sub-rule(1), the strength of Service shall be determined each year on the 1st day of January, or as soon thereafter as may be practicable according to the provisions of Appendix A. The strength so determined shall remain in force till it is revised.

(3) Notwithstanding anything contained in sub-rules (1) and (2), Government may appoint an officer to an ex-cadre post not included in the Service in accordance with the provisions of these rules, provided such post has been sanctioned."

A perusal of the aforementioned Rule would show that the service is to comprise of such number of posts of Assistant Engineers as are to be specified by the Government from time to time. The Rule gives wide power to the Government to re-examine the strength and composition of the cadre at an interval of every one year or as soon thereafter as may be practicable. It is pertinent to notice that the 1965 Rules have been framed by the Government in exercise of power conferred by proviso to Article 309 of the Constitution. Therefore, it is inherent that once the Government while framing the Rules in pursuance to proviso to Article 309 of the Constitution has kept power reserved to itself to determine and re-determine the cadre strength at specified intervals then such a power cannot be challenged, especially when the austerity measures are invoked. The petitioners after advertisement have merely been selected and further

steps for their appointment like medical examination, character verification etc. have been taken. A similar rule fell for consideration of a Division Bench of this Court in the case of Mohinder Singh (supra) wherein the right of the State Government to downsize the cadre strength of a service has been upheld. The controversy has also come before Hon'ble the Supreme Court in the case of **N. Ramanatha Pillai v. The State of Kerala, AIR 1973 SC 2641**. The following observations made therein are relevant to the controversy raised before this Hon'ble Court:-

> "A post may be abolished in good faith. The order abolishing the post may lose its effective character, if it is established to have been made arbitrarily, mala fide or as a mask of some penal action within the meaning of Article 311(2) of the Constitution of India."

Again in the case of **State of Haryana v. Shri Des Raj Sangar, AIR 1976 SC 1199**, similar view has been expressed. Reiterating the same principle, Hon'ble the Supreme Court in the case of **K. Rajendran v. State of Tamil Nadu, (1982) 2 SCC 273**, has observed as under:-

> "The power to abolish a civil post is inherent in the right to create it. The Government has always the power, subject, of course, to the constitutional provisions, to re-organise a department to provide efficiency and to bring about economy. It can also abolish an office or post in good faith. The action to abolish a post should not be

> just a pretence taken to get rid of an inconvenient incumbent."

It was further pointed out that whether the action taken is legislative or executive, it is always subject to judicial review. It was stated thus:-

> "The power to abolish a post which may result in the holder thereof ceasing to be a Government servant has to be recognised. But we may hasten to add that any action legislative or executive taken pursuant to that power is always subject to judicial review."

When the aforementioned principles are applied to the facts of the present case, it becomes evident that the decision of the respondent State to reduce the cadre strength of the cadre of Assistant Engineer from 235 to 153 posts of Assistant Engineer (Civil) in pursuance to the decision of the Council of Ministers, dated 15.3.2001, cannot be regarded as illegal. It is also pertinent to mention that the austerity measures resulting into down-sizing cadre strength have been adopted in many departments of the respondent State including Public Relation, Food and Supplies, Women and Child Development, Law and Justice, Medical Education, Rural Development etc., as per the letter of the Chief Secretary, issued on 4.1.2007, Annexure A-1 with the affidavit dated 9.1.2007, filed by Shri Dharamvir, IAS, Financial Commissioner and Principal Secretary to Government Haryana. It is further pertinent to notice that according to the aforementioned affidavit the cadre of Assistant

Engineer (Civil) comprised only of 159 posts and according to quota of direct recruit existing at that time, the number of direct recruit came to 91 and that of promotee to 68. It has been categorically stated that against quota of 91 direct recruit Assistant Engineers already 109 direct recruits were working and there was no post which could be filled up out of the list of recommended candidates forwarded by the Haryana Public Service Commission and no offer of appointment could be made to such like persons including the petitioners.

Ancillary Issues:

At this stage it may be appropriate to make a reference to ancillary controversies raised during the arguments. One argument raised was that large number of Junior Engineers were promoted on the post of Assistant Engineer (Civil) on ad hoc basis, which resulted into encroaching upon the quota of direct recruits. Both the parties placed reliance on the Gradation Lists for calculation of the vacancies. However, once the affidavit filed by Shri Dharamvir, IAS, Financial Commissioner and Principal Secretary to Government of Haryana, has disclosed the vacancy position, I do not deem it necessary to go into the calculation based on Gradation Lists. It is not possible for the Court to go into the facts, especially when a responsible officer of the rank of Financial Commissioner has filed an affidavit disclosing number of posts occupied by direct recruits as well as promotees.

Another argument which needs to be disposed of at this stage is concerning change in quota. The petitioners have submitted

that the quota rule has undergone change from 26.6.1990 and for direct recruitment 57 posts have been allocated whereas the promotees have been given 43 posts in the roster of 100 vacancies. The argument is that if the vacancies were to be counted according to 57:43 ratio after the date of amendment carried on 26.6.1990 then more posts would fall to the share of direct quota, which support the case of the petitioners. This argument also is fallacious because the advertisement in this case for filling up posts of Assistant Engineers was issued in July, 1996 for 6 posts of Assistant Engineers (Civil). Thereafter in September, 1999 by a corrigendum, the number of posts was increased from 6 to 39, when a new advertisement was issued. There is, thus, no room to entertain any doubt that the vacancies must have been counted in accordance with the amended Rules. In any case, the calculation of vacancies cannot be doubted because the affidavit filed by the Financial Commissioner and Principal Secretary to Government Haryana must be accepted. Therefore, the first argument and the ancillary arguments raised on that issue are liable to be rejected.

RE: QUESTION II:

This question is no longer *res integra*. The question was authoritatively settled by Hon'ble the Supreme Court in the cases of **State of Haryana v. Subhash Chander Marwaha, (1974) 3 SCC 220; Mani Subrat Jain v. State of Haryana, (1977) 1 SCC 486;** and **Jatendra Kumar v. State of Punjab, (1985) 1 SCC 122**. The matter was again referred to a five Judge Bench of Hon'ble the Supreme Court in the case of Shankarsan Dash (supra). Speaking for the

Bench and after placing reliance on the earlier judgments of Hon'ble the Supreme Court in the cases of Subhash Chander Marwaha (supra); Jatendra Kumar (supra) and **Neelima Shangla v. State of Haryana, (1986) 4 SCC 268**, in para 7 their Lordships' have observed as under:-

> " 7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander

> Marwaha [(1974) 3 SCC 220], Neelima Shangla v. State of Haryana [(1986) 4 SCC 268], or Jatendra Kumar v. State of Punjab [(1985) 1 SCC 122]."

The aforementioned view has been followed and applied in the case of U.P. Bhumi Sudhar Nigam Limited (supra), Rani Laxmibai Kshetriya Gramin Bank (supra), Batiarani Gramiya Bank (supra), Vinodan T. (supra) and Rajkumar Sharma (supra). It may be appropriate to mention that in the case of Harish Chandra (supra), the Court also went into the question as to whether a writ of mandamus could be issued directing the State to appoint the writ petitioners. Holding that no such direction could be issued, their Lordships' held as under:-

> "……Further question that arises in this context is whether the High Court was justified in issuing the mandamus to the appellant to make recruitment of the writ petitioners. Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on the date of the petition. The duty that may be enjoined by mandamus may be one imposed by the Constitution or a Statute or by Rules or orders having the force of law. But no mandamus can be issued to direct the Government to refrain from enforcing the provisions of law or to do something which is

> contrary to law. This being the position and in view of the Statutory Rules contained in Rule 26 of the Recruitment Rules we really fail to understand how the High Court could issue the impugned direction to recruit the respondents who were included in the select list prepared on 4.4.1987 and the list no longer survived after one year and the rights, if any, of persons included in the list did not subsist. ……"

According to Article 141 of the Constitution, law declared by Hon'ble the Supreme Court is binding not only on all Courts of the country but also on the executive authorities. Therefore, the facts of the present case necessarily have to be examined in the light of the aforementioned principles laid down by Hon'ble the Supreme Court. It is true that the names of the petitioners were included in the select panel but before they could acquire any right to the post, the respondent State resorted to austerity measures and the cadre strength of Assistant Engineer (Civil) was reduced from 235 to 153 posts. A categorical statement has been made in the affidavit filed by Shri Dharamvir, IAS, Financial Commissioner and Principal Secretary to Government Haryana, that no post of Assistant Engineer (Civil) was available, which could have been offered to the petitioners, who were selected by the Commission. The aforementioned statement made in sub-para (iii) of para 2 of the affidavit is set out below:-

> " After the restructuring of the department, the cadre of Sub Divisional Engineer/ Assistant Engineer (Civil), comprised of 159 posts. As per the then existent Rule-6 of the Punjab Services of Engineers Class-II PWD (B&R) Branch Rules, 1965, number of posts for direct recruitment came down to 91 and that of promotees came to 68. Against quota of 91 Assistant Engineers (by direct recruitment), there were already 109 direct recruits working at that time, and thus there remained no post which could be filled up out of the recommendees of the Haryana Public Service Commission. As such 39 candidates recommended by the Haryana Public Service Commission could not be offered appointment"

In resorting to austerity measures the respondent State also followed the policy of avoiding any termination or reversion. In that sense it became a diminishing cadre to the extent of reduction of posts. It is, thus, clear that the number of posts meant for direct recruits were already over subscribed and no appointment could have been offered to the petitioners. I do not find any extraneous consideration or malice on the part of the respondents to reduce the cadre strength because such like austerity measures have not been applied only in the case of the petitioners but also in other departments as has already been noticed. The argument that the number of Chief Engineers, Superintending Engineers, Executive Engineers continued to be the same has emerged from the fact that the

respondent State did not resort to wholesale reversion or termination and allowed the cadre to reduce in its usual course. In other words, the posts were not to be filled up after retirement of a particular incumbent and the process was to be followed till the time the number of incumbents became equivalent to the number of reduced strength as has been argued and suggested by learned Additional Advocate General, Haryana. Therefore, I am of the considered opinion that in the facts and circumstances of the case no indefeasible right is conferred on the petitioners to seek appointment to the posts advertised by the process of writ of mandamus.

RE: QUESTION III:

On the afore-mentioned issue reliance by learned counsel for the petitioners have been placed on a judgment of Hon'ble the Supreme Court in the case of Ram Swarup Saroj (supra), which lays down the proposition that merely because a period of one year has elapsed during the pendency of litigation, relief to a petitioner invoking Article 32 could not be declined. In that case, the petitioners have filed the writ petition in October, 1997 and the select list was to expire in November, 1997. The procedure adopted by the Public Service Commission for determining the order of merit in the select list was challenged by the general category candidates by filing a writ petition. That petition was allowed and directions were issued that the order of merit was to be arranged by giving weightage to the marks secured by the candidates at the interview whereas the procedure earlier followed was that if two or more candidates have obtained the same marks then while determining their position *inter-*

se in the list of selected candidates they were to be so arranged as to place a candidate who had obtained higher marks in the written examination above the candidate obtaining less marks in that examination. On account of directions issued by the High Court, the order of merit has to be changed and the list of successful candidates belonging to the general category was altered also underwent certain changes. Those directions were also applied by the authorities for finalizing the list of successful candidates belonging to scheduled caste category. The list of successful candidates was finalised by the Public Service Commission in the month of November, 1996. All successful candidates except one joined the service and in the month of October, 1996 a writ petition was filed by one of the candidates seeking directions to the State of Uttar Pradesh to offer the vacancy caused by non joining of one candidate to him. It was in these circumstances that the argument concerning life of select penal was rejected by observing as under:

> " Similarly, the plea that a list of selected candidates for appointment to the State services remains valid for a period of one year only is primarily a question depending on facts and yet the plea was not raised before the High Court. Secondly, we find that the select list was finalised in the month of November, 1996 and the writ petition was filed by the respondents in the month of October, 1997 i.e. before the expiry of one year from the date of the list. Merely because the period of one year has

elapsed during the pendency of litigation, we cannot decline to grant the relief to which the respondent has been found entitled by the High Court……"

The afore-mentioned observations of Hon'ble the Supreme Court would substantiate that on the mere basis that litigation is pending and one year with regard to select list has expired was not to constitute the basis for declining the relief to the petitioners in that case. However, the question in the present case is quite different. It is one thing to say that the select list would continue to be alive if before the date of its expiry the writ petition has been filed. It is, however, different proposition if after the preparation of select list the cadre strength has been reduced by down sizing the cadre of Assistant Engineers (Civil) alongwith other cadres and other departments. The afore-mentioned decision, as already held, is bona-fide. There was no such fact in Ram Swarup Saroj's case (supra) and this fact alone would be suffice to conclude that once no post was available after reduction in cadre strength then whether select list is to survive or not would pale into insignificance. In such circumstances it is not possible to issue any direction to the respondents to offer appointment to selected candidates because no posts were available. The question then is that 44 posts of Assistant Engineers (Civil) were sought to be filled by sending a requisition by the Government on 3.3.2006. Those posts/vacancies became available much later and in any case subsequent to the decision of Council of Ministers taken on 15.3.2001. That too after applying a cut on the cadre strength.

Therefore, the petitioners would not be entitled to stake any claim to those posts. They might have applied for those posts. Therefore, the argument does not merit acceptance and is thus liable to be rejected.

For the reasons aforementioned, these petitions fails and the same are dismissed.

(M.M. KUMAR)

December 3, 2007
JUDGE

Pkapoor/paramjit

FIT FOR INDEXING